Supreme Court, U.S.
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No. 01-1046

In The

Supreme Court of the United States

DIALYSIS CLINIC, INC.,

Petitioner,

v.

NELLIE FRY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE FACTS

Nellie Fry was hired as a clinical supervisor in Defendant's Wilkinsburg office in July of 1993. Ms. Fry's duties were to hire nurses, staff and patient education and supervision of the nurses. In the chain of command at DCI clinics the administrator was at the top. Next in line were the clinical supervisor, Nellie Fry, and the chief technician, Alan Shearer. Ms. Fry supervised approximately twenty to thirty employees whereas Alan Shearer supervised approximately six employees. Ms. Fry could not initiate any discipline against Alan Shearer. David Chabal replaced Roger Boles as administrator in October of 1995, and became Fry's immediate supervisor. She was fired on July 30, 1996, when she was fifty-three years of age.

Nellie Fry was fired supposedly because "she destroyed a medical document or record". The document at issue was a 1996 progress note for a patient. Fry was off work on July 4th and 5th, 1996 (Thursday and Friday). She went to the clinic on Saturday, July 6 and learned that a patient had not shown up for his dialysis on Friday, July 5. Saturday was her day off, but she frequently went to the clinic. She looked at the subject chart, observed that he had missed his treatments and called his home, but no one answered. She marked his chart a "no show" and that she called him. However, she innocently entered the date as "7/5/96".

On Monday, July 8, 1996, Fry went to Chabal and told him that this patient had missed his three scheduled treatments for the prior week. On that same day Lori

Peterle, Dr. Cooksey's nurse practitioner, went to Cooksey, the medical director at DCI, concerning entries on this page. Then, three days later, on July 11, 1996, Chabal met with Fry and they discussed the patient's chart. The only topic was Fry's misdated entry on the subject chart. At that time Fry acknowledged the dating error of the 7/5/96 entry. Her entry should have been dated 7/6/96.

Chabal ordered Fry to "rewrite it or fix it". He did not reprimand or discipline her for this entry. Fry had the entire page rewritten in accordance with the instructions given to her by Chabal. Fry went to the nurses and told them to make their entries anew (just as they had before) and to date the rewritten entries as having been made on 7/11/96. The result of this was a rewritten chart. It was confirmed that Fry had gone to the DCI medical director, Dr. Cooksey, for guidance on how to correct the entries.

The rewritten note shows the date of entry as 7/11/96, followed by a notation of when the entry was originally made or when the matter was actually done. Fry had everyone make the proper entries on the new progress note, but she forgot to make her entry for 7/5/96, the Saturday she also called the patient. This was the manner in which Fry endeavored to correct the chart. After she made the corrections, she took both the original and rewritten charts and in accordance with DCI policy placed them on the desk of the charge nurse. Because the patient's chart was not available at that time, the rewritten chart could not be placed in file at that time. This was the policy of the DCI clinic and it made sense to do so rather than search the entire premises for a chart. The charge nurse would do the filing later.

DCI's rules and regulations governed the handling of medical records. According to the rules, it was the duty of the clinical supervisor (Fry) to maintain the patients' charts or to designate another to do so. DCI admitted that someone other than the clinical supervisor can be designated to maintain the records. Fry created the records maintenance policy for the clinic in which she worked. In doing so she designated the charge nurse as the responsible party. The policy which she implemented was such that if a patient's chart could not be located progress notes were to be left on the charge nurse's desk and filed by the charge nurse at the end of the day. Dr. Cooksey confirmed this practice as did another DCI employee, Emily Jiran. Ms. Jiran also confirmed that there is no precise rule on maintenance of medical records for all DCI clinics. It is left up to each individual clinic to form its own policy.

On July 30, 1996, Chabal and his assistant came to Fry's office. They asked her where the original chart for 7/5/96 was. She told them it was in the patient's file, and they responded that it was not. She told them she laid it on the charge nurse's desk. She denied ever saying or admitting that she threw it away. No one ever conducted a search to locate the original. Additionally, it is undisputed that DCI was in possession of a copy of the original note. After advising Fry that Alan Shearer had falsified a chart and had been placed on one year probation, she was fired by Chabal solely because she was unable to produce the original progress note. Fry had no prior disciplinary incidents of any nature during her entire employment history with DCI and always received excellent evaluations.

Comparator, Shearer Similarly Situated

Another employee at the Wilkinsburg office was Alan Shearer. When Fry began at DCI, Shearer was a supervisor and chief technician. His position was parallel with Fry's. Shearer supervised the machine operators and was responsible for tending to the dialysis machines. Fry was responsible for the nurses. As of July 30, 1996, Shearer was no longer the chief technician but rather a technician. In either role Shearer's duties included performing safety tests on equipment responsible for the life or death of patients. Regardless of his job title, at no time did Shearer report to Fry. Moreover at all times Fry neither had authority over Shearer nor could she discipline him. All matters of discipline were at the sole discretion of the administrator, Chabal. Fry and Shearer both reported to the same administrator. They both had responsibilities for patients' safety. They were both bound by the same work rules and regulations as published by DCI. At all times they were both evaluated by the administrator under the same standards and on the same evaluation form. They were equals in every relevant aspect.

Shearer's employment record was abysmal; he was on probation twice, had four written warnings, eleven write-ups and eight verbal warnings. In all there were twenty-four disciplinary events. One of these incidents, which occurred contemporaneously with Fry's termination, was the falsification of test results for a water treatment log. One of Shearer's responsibilities included testing water values for machines that were used to treat patients. On July 29th, 1996 it was discovered that he failed to perform these tests. The next day, July 30th, it was discovered that Shearer had filled in the values for

the water treatment tests for both July 29th and 30th. Shearer had apparently performed the tests on the 30th and then fraudulently filled in almost identical numbers for both days.

DCI strains to make a distinction that Fry falsified a medical record while Shearer did not. Shearer made an entry that he had checked the water system of the dialysis machine when he had not. His job was to test the water for the machines to assure that the water had no impurities. If there were impurities, a patient could die. These are grounds for immediate termination under DCI rules, which include, "Falsifying any facility records . . . machine checks . . . actually omitted". There is evidence that a water treatment log is a medical record because it relates to a patient's care. Regardless, Shearer was only put on probation for his twenty-fourth rule violation.

DCI's physician, Dr. Cooksey, admitted that what Fry was accused of doing did not endanger a patient's life. Cooksey also testified that several of Shearer's actions potentially endangered patient's lives. Several of these violations were committed while Shearer was the chief technician and a supervisor. Dr. Cooksey stated that Shearer did in fact falsify a medical record, as did Richard Kelly, who was then an assistant administrator and a current administrator, and Bob McDivitt, another DCI administrator. Patient care is DCI's highest priority and any act which might endanger the safety or lives of another is always an immediate termination offense. However, Fry was fired and Shearer was not.

Alleged Higher Standard

DCI published and enforced a single set of Rules and Regulations which governed all employees regardless of status. There are no separate rules for different jobs; there are not multiple tracks of discipline. These rules establish a procedure for discipline, from verbal warning to discharge. The procedure is progressive in nature. All employees are governed by the same standard irrespective of one's position. The stated purpose of DCI's rules and regulations is, "to develop guidelines regarding employee discipline and discharge to assure fair, equitable and consistent treatment of *all employees.*" (Emphasis added). All jobs are judged in the same manner in regard to safety. If there was a different rule for managerial personnel it was never communicated in writing or orally nor was it ever enforced prior to Fry's discharge. In fact, in regard to patient safety there was one standard applicable to all employees.

Further, DCI's argument that it held its supervisors to a higher, unwritten standard is unsupported by the facts; Shearer, when he was the head technician and supervisor, was never held to any higher standard. It is undisputed that when Shearer began at DCI he was the chief technician and a supervisor. During his tenure at DCI, Shearer committed 24 rule violations many of which occurred while Shearer was the chief technician. Among the violations committed while chief technician included those which potentially endangered DCI patients' health and safety, including putting a patient on the wrong potassium bath on two separate occasions. Dr. Cooksey confirmed that these violations potentially jeopardized patient's health and safety whereas Fry's actions did not.

DCI admitted that any act which endangers the safety of lives of its patients is always a termination offense and yet Shearer, a supervisor, was not terminated for doing so several times. Even if DCI truly did hold supervisors to a higher, unwritten standard it was not applied to a younger male, Shearer.

DCI notes that Jeffrey Gaines, a younger male employee, was fired for falsifying a medical record. Gaines cannot be compared to Fry. Gaines was allegedly terminated for signing another staff person's initials to a medical record. His termination occurred after the subject litigation had commenced. Moreover, he was a probationary employee, who admitted that he directly entered false data on a medical record. He signed another employee's initials, for actions taken by that employee, to a patient's chart. Plaintiff, on the other hand, admitted that she had mistakenly entered the wrong date, for actions she herself had taken, on a record. These incidents are inapposite.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Is Not in Conflict with the Cases of this Court.

All inferences of fact must be made in favor of the verdict winner, and all evidence must be viewed in a light most favorable to the verdict winner. *Woodwind Estates, Ltd. v. Gretowski*, 205 F.3d 118 (3rd Cir. 2000).

DCI cites two cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118

S.Ct. 2275, 141 L.Ed. 2d 662 (1998), as controlling regarding the issue of disparate treatment. This reliance is misplaced. These cases generally stand for the proposition that an employer can be vicariously liable to a victimized employee for an actionable hostile environment created by a supervisor who has authority over the victim. There is no dispute in this case that DCI discriminated against Fry and that the person who did so was Fry's immediate supervisor, the administrator, Chabal. The only issues are whether Fry and Shearer were similarly situated and thus adequate comparators and, secondarily, did DCI hold managers to a higher standard of conduct.

In order to identify an adequate comparator the "comparables" must be similarly situated in all respects. *Stotts v. Memphis Fire Department*, 858 F.2d 289 (6th Cir. 1988). To be deemed "similarly situated" the individuals with whom the plaintiff seeks to compare his or her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992). However, plaintiff's case and the comparison case need not be identical. *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 20 (1st Cir. 1999).

DCI contends that it is an undisputed fact that Fry was Shearer's supervisor. That is wrong. Fry and Shearer were both supervisors. At no time was Fry the supervisor of Shearer. When Fry began at DCI, Shearer was a supervisor and chief technician. His position was parallel with Fry's. Shearer supervised the machine operators and was

responsible for tending to the dialysis machines. Fry was responsible for the nurses. As of July 30, 1996, Shearer was no longer the chief technician but rather a technician. In either role Shearer's duties included performing safety tests on equipment responsible for the life or death of patients. Regardless of his job title, at no time did Shearer ever report to Fry. Moreover at all times Fry neither had authority over Shearer nor could she discipline him. All matters of discipline were at the sole discretion of the administrator, Chabal. Fry and Shearer both reported to the same administrator. They both had responsibilities for patients' safety. They were both bound by the same work rules and regulations as published by DCI. At all times they were both evaluated by the same administrator under the same standards and on the same evaluation form. Therefore they were equals in every relevant aspect.

DCI has presented the facts to this Court as though all inferences are to be made in its favor and viewed in a light most favorable to itself, the verdict loser. It is well established that just the opposite is true. *See, Woodwind Estates, supra.* The facts, as cited above, are all supported by trial testimony. Where there is a dispute of material fact regarding whether or not two employees are similarly situated, as was the case at trial, presents a fact specific inquiry for the jury. *Graham v. Long Island R.R.*, 230 F.3d 34 (2nd Cir. 2000); *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639 (3rd Cir. 1998). This issue was properly submitted to the jury and resolved in favor of Fry.

II. The Third Circuit's Decision Is Not in Conflict with the Decisions of Other Appellate Courts Because There Are Significant Differences in the Material Facts.

There is no conflict between the Third Circuit's decision in this case and the cases cited by DCI as they are all easily distinguisable. In *Pierce v. Commmonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994), the following was *undisputed;* Plaintiff was responsible for multiple offices, evaluated employees including the comparator, Kennedy, and was responsible for enforcing the sexual harassment policy. Kennedy had none of these responsibilities. In this case, the testimony at trial was that Fry did not supervise Shearer; they were equals. Fry also did not evaluate Shearer's performance. These are substantial differences in the facts that quickly renders *Pierce* inapplicable to the present case.

In *Hoffman v. MCA, Inc.*, 144 F.3d 1117 (7th Cir. 1998), the issue before the Court was age discrimination, not disparate treatment, as is the case here. The plaintiff attempted to bolster his argument that the reason he was fired was pre-textual by comparing his treatment to that of lower level employees. The issue of similarly situated employees was a tangential issue at best and clearly does not stand for the proposition that a vice president and low ranking employees are not adequate comparators. Also, it was again undisputed that the plaintiff was a superior of the comparators.

In *Watts v. City of Norman*, 2001 U.S. App. LEXIS 23905 (10th Cir. November 5, 2001), it was undisputed

that the comparators were a fire chief and his subordinate. This is a substantial and material difference from the case at issue. Shearer was not subordinate to Fry at any time during her employment.

In *Jones, et al. v. Denver Post Corp.*, 203 F.3d 748 (10th Cir. 2000), it was again undisputed that the plaintiff was subordinate to his supervisor. None of the cases cited by DCI are applicable to the instant action. There is a critical distinction between the cases cited by DCI and this case which is fatal to DCI's argument. That being the trial testimony that Fry was not a supervisor of Shearer and had no authority over him. It was the province of the jury, not the Court, to accept or reject this testimony as true. They were equals in every relevant aspect of work. DCI's argument hinges on Fry being a supervisor of Shearer. While these were the facts in the cases cited above, the facts of this case are conspicuously different. This is why DCI's argument must fail. If there is a dispute regarding this issue, it is a fact specific question for the jury. *See, Graham* at 39 and *Simpson* at 644-5, *supra*.

To accept DCI's contention that Fry and Shearer were not similarly situated as a matter of law would be to substitute the Court's judgment for that of the jury. All questions of fact are to be decided by the fact finder. Since all inferences of fact must be made in favor of the verdict winner and all evidence must be viewed in a light most favorable to the verdict winner, it must be accepted as true that Fry and Shearer were similarly situated. *See, Woodwind Estates, supra.*

III. A Higher Standard of Conduct Applicable to Managers Never Existed at DCI or, If it Did Exist, Was Applied in a Discriminatory Fashion.

The last issue is the existence of an illusory higher standard of conduct. DCI attempts to turn the holdings in *Ellerth* and *Faragher* around in stating that this Court requires that all employers impose a higher standard for its managers as opposed to non-managers. This is plainly not the case. *Ellerth* and *Faragher* address vicarious liability where a supervisor engages in illegal conduct. These cases do not hold and there is no authority cited by DCI that requires employers to impose two separate codes of conduct or a higher standard of conduct upon managers versus non-managers. While issue of liability can be effected by the status of an offending employee there is no Court imposed mandate that requires employers to treat managers and non-managers differently. There is ample evidence to support the position the DCI never imposed a higher standard for supervisory employees. Conversely there is little evidence to support the position that it did. In fact the evidence supports the finding that a higher standard did not exist until DCI needed an excuse for its disparate treatment of Fry.

Even if it could be argued that Fry and Shearer were not similarly situated at the time of her firing, the proposition that DCI held managers to a higher standard must fail. Shearer, when he was a supervisor, was never held to a higher standard of conduct. It is undisputed that when Shearer began at DCI he was the chief technician and a supervisor. During his tenure at DCI, Shearer committed 24 rule violations. Many of these rule violations occurred while Shearer was the chief technician. Among those

committed, while a supervisor, were violations that potentially endangered DCI patients' health and safety, including putting a patient on the wrong potassium bath on two separate occasions. Dr. Cooksey confirmed that these violations potentially jeopardized the patient's health and safety.

These violations are in addition to the other numerous transgressions that occurred prior to his demotion when Shearer still enjoyed supervisory status. It is worth noting that Shearer's demotion was not a punishment imposed by DCI but was done at the request of Shearer. Where was this alleged higher standard that, if applied evenly, would mandate the termination of Shearer? Despite patient safety being DCI's highest priority and jeopardizing the same is always an immediate terminable offense, Shearer, a supervisor, was not fired. Nor was Shearer fired for numerous other violations which endangered DCI patients' health and safety, including failing to properly calibrate a UF pump, placing a wrong sized dialyzer on a patient and falsifying records by indicating that he tested equipment when, in fact, he had not.

DCI's argument obviously suggests that they want to have it both ways. DCI did not have a higher standard for a younger male, Shearer, for rule violations that are at the least similar to and at worst much more severe than Fry's while he was a supervisor. If there were, Shearer would have been terminated when he was the chief technician. He was not. However, when DCI needed a reason to justify its discriminatory treatment of an older female, Fry, the higher standard suddenly appears out of thin air. It was the filing of this lawsuit that precipitated the

creation of such standard because it obviously did not exist previously.

But, assuming further that a higher management standard did exist, the fact that Shearer was not fired for the numerous violations cited above while a manager and Fry was fired for lesser offenses is further evidence of sex and age discrimination. The only question is where the jury found illegal discrimination; did the jury reject DCI's contention that it held managers to a higher standard and found discrimination in DCI's firing of Fry and not Shearer for similar violations they each committed in July of 1996; or did they believe that a higher management standard did exist and DCI was guilty of discrimination in imposing the same upon Fry and not Shearer. DCI attempts to present this case in a vacuum limited to the month of July 1996. That is not what the evidence presented at trial indicated and not what the jury relied upon in reaching a verdict.

DCI further argues both sides of the fight when stating that Fry and Shearer are not similarly situated and then in the same breath DCI attempts to compare Fry with a younger male named Jeffrey Gaines. Gaines was a probationary employee who signed another DCI employee's name to a medical chart. So even though Shearer is not comparable, it argues that a probationary employee who signed another's name is. Again, DCI wants to have it both ways. It cannot. If Gaines is comparable then Shearer certainly is too.

To allow DCI to shelter itself from discriminatory action by claiming it holds supervisors to a higher

standard would completely disregard its actions in applying its rules and standards to a younger male, Shearer. The precedent would allow an employer to apply a higher standard arbitrarily at the employer's whim. This would effectively allow an employer to discriminate against its employees and hide such discrimination behind a "higher standard" whenever convenient.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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